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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

HARLAN LANE, _____ *Petitioner*

v.

UNITED STATES OF AMERICA, _____ *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Harlan Lane, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 14, 1972.

OPINION BELOW

The opinion of the Court of Appeals in this cause has not yet appeared in the official Federal Reports, but a copy of its opinion is appended hereto as Exhibit "A".

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1972. No petition for rehearing was filed, but application for stay of mandate was made to that Court on June 19, 1972, and was granted on June 22, 1972.

The jurisdiction of this Court is invoked under *28 U.S.C.A. 1254(1)*.

QUESTION PRESENTED FOR REVIEW

Whether the trial court erred in extending the scope of *18 U.S.C.A. 215* by instructing the jury that it might convict the Petitioner if it found that he stipulated for a commission for procuring from the bank in which he was an officer a loan to a company, even though the stipulation was that the commission be paid to or for the benefit of La-Co. Inc., a corporation, and not to or for the benefit of the Petitioner personally.

STATUTE INVOLVED

The statute involved in this case is *18 U.S.C.A. 215* which reads as follows:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both."

STATEMENT

1. The Information charged that the Petitioner, being Chairman of the Board of Directors of Union National Bank of Little Rock, the deposits of which were insured by the Federal Deposit Insurance Corporation, knowingly and unlawfully stipulated for a fee, commission, and thing of value from Wheel-Air, Inc. for procuring for Wheel-Air, Inc. a loan from said bank in violation of *18 U.S.C.A. 215.*

2. The trial court instructed the jury, over the objections of Petitioner, that although La-Co. Inc., a corporation, rather than Petitioner personally, was intended to benefit, and did benefit, from the payment of the commission does not make a particle of difference because *18 U.S.C.A. 215* is violated whether the banker gets the benefit of the commission himself, or whether the benefit goes to some corporation in which the banker is interested, or whether the benefit goes to an utter stranger. This construction of the statute was approved by the Court of Appeals.

3. On October 28, 1971, the Petitioner was found guilty by a jury in the United States District Court for the Eastern District of Arkansas, Western Division.

4. On November 9, 1971, the District Court entered a judgment committing Petitioner to the custody of the Attorney General for imprisonment for six (6) months and assessing a fine of $5,000 to stand committed. This judgment and sentence were affirmed by the Court of Appeals for the Eighth Circuit on June 14, 1972, and the mandate to the Clerk of the District Court was stayed on June 22, 1972. The Petitioner is presently on bond.

REASON FOR GRANTING THE WRIT

1. Error was committed in enlarging the statute upon which the Information was based by instructing the jury that it was a crime for an officer of an insured bank to stipulate for the payment by a borrower of a commission to a corporation in which the banker is interested or to an utter stranger for procuring for the borrower a loan from the bank. Such construction of the statute was approved by the Court of Appeals. The statute reads "stipulates for or receives or consents or agrees to receive." It was admitted that the Petitioner did not personally receive a commission, fee, gift or thing of value. "Consents to receive" obviously means that the banker gave assent to the proposal of the commission and "agrees to receive" plainly means that the banker arrived at a satisfactory understanding as to the commission. "Stipulates for" means that the banker made an express demand for the receipt of the commission. The statute was intended only to encompass (1) receipt by the banker, (2) consent by the banker to receive, (3) agreement by the banker to receive, and (4) demand by the banker for receipt. It was the purpose of the statute to protect a borrower not only from the receipt or acquiescence in the receipt or agreement to receive but also from the demand of a banker for a commission. An important question of federal law is presented which has not been, but should be, settled by this Court.

2. The decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit in *Ryan* v. *United States* (C.A.9, 1960) 278 F(2) 836, wherein the Court approved an instruction that a "defendant could not be convicted of a violation of the statute unless he received" the commission. In every other reported decision involving the statute the banker personally re-

ceived the commission for procuring the loan. *United States* v. *Lotsch* (C.A.2, 1939), 102 F(2) 35; *United States* v. *Sober* (C.A.3, 1960), 281 F(2) 244; *United States* v. *Gerken* (D.C.N.Y., 1960) 182 F.S. 738; *Application of Weiss* (D.C.N.Y., 1969) 283 F.S. 97; *United States* v. *Cafaro* (D.C.N.Y., 1960) 26 F.R.D. 170; and *McCabe* v. *Sacchetti* (1919) 73 Pa. Super. 500. The present case is the only one in which a court has expanded the scope of this statute to make it include the express demand of a banker *for payment* of a commission *to a third party.*

3. The statute from which *18 U.S.C.A. 215* is derived (Section 22, Chapter 6, of the Acts of Congress, December 23, 1913, (38 Stat. 732) read:

> "No officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift or other consideration for or in connection with any transaction of business of the bank."

Congress amended this section from time to time in various particulars, the most noteworthy one being the elimination of the words "directly or indirectly." Congress thereby intended to constrict its coverage from that intended in its fellow sections in *Chapters 11 and 31 of Title 18 U.S.C.A.* Each of those companion sections contains the words "directly or indirectly" or "to or for any other person or entity" or "to the use of another" or to "his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment." *Sections* 201, 203, 208, 216, 645, 646, 658 *and* 664 *of Title 18.* It is thus evident that when Congress wishes to prohibit both direct and indirect payments or benefits it knows how to say so. Congress in-

tended to say and did say in *18 U.S.C.A. 215* that a banker for procuring a loan from his bank shall not receive, consent to receive, agree to receive or expressly demand the receipt of a commission. The prohibition was directed against the receipt, consent, agreement or demand for personal emoluments. The statute does not read "stipulates for the payment to" a third party as the Court of Appeals erroneously interpreted it.

4. The Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of criminal statutes" or "to guess at the statute's meaning and differ as to its application" since no man can be held criminally responsible for conduct which he could not reasonably understand to be prohibited. *Bouie* v. *Columbia* (1964) 378 U.S. 347, 12 L.Ed (2) 894. While an Act should be interpreted "so as . . . to give full effect to its plain terms" there must not be a departure from its words and context, *Pierce* v. *United States* (1941) 314 U.S. 306, 86 L.Ed. 226, and it is "dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States* v. *Wiltberger* (1820) 5 Wheat. 76, 5 L.Ed. 37. Citing *Wiltberger*, supra, in an unanimous opinion, Mr. Justice Butler in *United States* v. *Resnick* (1936) 299 U.S. 207, 81 L.Ed. 127, wrote:

> "Statutes creating crimes are to be strictly construed in favor of the accused. . . . "

The trial court in instructing the jury departed from the plain words of the statute, *Pierce, supra;* required the Petitioner to speculate and guess at its meaning, *Bouie,*

supra; and held the Petitioner criminally responsible for conduct which he could not reasonably understand to be prohibited, *Bouie*, supra. The Petitioner had a right to have the statute strictly construed in his favor, *Wiltberger* and *Resnick*, supra. The violation of these fundamental rules by the trial court was erroneously approved by the Court of Appeals and this error should be redressed by this Court.

CONCLUSION

18 U.S.C.A. 215 denounces the receipt, consent to receive, agreement to receive or express demand of the banker for the receipt of a commission for procuring a loan. It is limited to a banker benefitting or attempting to benefit personally from a borrower. This compelling conclusion is reached by comparing this statute with all of its companion statutes which patently are much broader in scope and by examining the construction of this statute in all of the other reported decisions in which it is involved. In this case the statute was not strictly construed in favor of the Petitioner as was his right.

It is respectfully submitted that this Petition for Writ of Ceritorari to review the judgment of the Court of Appeals for the Eighth Circuit herein be granted.

Respectfully submitted,

Leon B. Catlett
727 Pyramid Life Building
Little Rock, Arkansas

Attorney for Petitioner

EXHIBIT "A"

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1664

United States of America,
Appellee,

v.

Harlan Lane,
Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 14, 1972.

Filed: June 14, 1972.

Before MR. JUSTICE CLARK,* MATTHES and LAY, *Circuit* Judges.

CLARK, Associate, Justice.

The appellant, Chairman of the Board of Directors of Union National Bank, stands convicted by a jury of viola-

*The Honorable Tom C. Clark, Associate Justice of the United States Supreme Court, Retired, sitting by special designation.

tion of Section 215 of Title 18 of U.S.C.A. which makes it an offense for "an officer or director of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation to stipulate for . . . any fee, commission, gift or thing of value from any person, firm or corporation for procuring . . . any loan . . . . " He made a $1,000,000 loan to Wheel-Air Inc. on behalf of the Bank, and Wheel Air paid a commission of $125,000 for procuring the loan to La-Co Inc., of which appellant was the Chairman of the Board of Directors and controlling stockholder. Two errors are claimed: (1) The jury was instructed that it might find the appellant guilty if it found that he stipulated for the payment of the commission even though the commission was to be paid to La-Co, rather than to or for the benefit of appellant personally; and (2) that the information on which the offense was based, charged appellant with stipulating for a commission to be paid to him personally, whereas the proof was that it was actually paid to La-Co Inc. Neither of the points has merit and the judgment is affirmed.

1. We take up the latter contention first. The Information, aside from its jurisdictional affirmance, charged that appellant "knowingly and unlawfully did stipulate for a fee, commission and thing of value from Wheel-Air Inc. . . . " for procuring for Wheel Air Inc. a loan from said Union National Bank." The language is that of the Act and certainly does not state or in any wise imply that appellant stipulated for a commission to be paid to appellant personally. Indeed, if there was any ambiguity which we do not see, the appellant had recourse to a bill of particulars which he did not pursue. On the contrary, the words are of such specificity that appellant was able to and did prepare his defense with such effectiveness that this is his second trial on the charge, his first conviction

based on an indictment having been set aside by the court because of error claimed by the appellant.

2. Nor does the second claim have any merit. It seems clear to us that the purpose of the Act was to protect the deposits of banks having federal insurance by preventing unsound and improvident loans to be made from such deposits by officers and directors of the bank. The Congress was not interested in who received the commission but was merely insulating loan transactions from the influence of such a practice. When a commission is stipulated by an officer of a bank, the probability is that his judgment on the merits of the loan is adversely affected tremendously. The evil is not removed by a stipulation that provides for payment of a commission to a third party, especially where an interest in the third party is traceable directly to the banker. In such a case the banker is violating a position of trust that he owes to the bank. This position is buttressed by the fact that Section 215 is found in the Bribery, Graft and Conflicts of Interests Chapter of the Title (Chapter XI). Here the record clearly shows that appellant was influenced in making the loan by the payment to La-Co. A $1,000,000 loan was made to a 26-year old youth without investigation and secured by a wrecked airplane, under terms that were illegal under the state usury laws.

Moreover, the use of the disjunctive "or" by the Congress between the words "stipulate for" and "receive" in the statute reveals a clear intent to make either one an offense, thus protecting the deposits of a bank so insured not only from commissions to be received by third parties but those that are stipulated for the banker personally. Even the strictest of construction could permit no different

result. Congress has clearly said what it meant and it is not for us to say that it did not mean what it said.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-68

HARLAN LANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner, then Chairman of the Board of Directors of the federally insured Union National Bank of Little Rock, was convicted of having violated 18 U.S.C. 215 by having stipulated for the payment of a commission of $125,000 in exchange for the procuring of a

$1,000,000 loan by the bank to Wheel-Air, Inc. The commission was to be paid by Wheel-Air to La-Co., Inc., a corporation of which petitioner was Chairman of the Board of Directors and the controlling stockholder. Petitioner was sentenced to six months' imprisonment and a fine of $5,000. The court of appeals affirmed (Pet. Ex. A).

The opinion below answers petitioner's contention that the statute does not apply to stipulations for fees not to be paid personally to a bank officer (Pet. 10-11) and we rely on that opinion. We point out specifically, however, that petitioner's reliance on *Ryan* v. *United States*, 278 F. 2d 836 (C.A. 9), is misplaced. In *Ryan* the court of appeals sustained a conviction for violation of Section 215 against a challenge that it could not be applied to fees, commissions or gifts received *after* the loan was made. *Ryan* did not deal with the question whether the bank official must receive the commission personally to violate the Section. The purpose and language of the statute are clear and cover petitioner's misconduct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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